Filed 8/14/19 Halo Unlimited, Inc. v. County of Riverside CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

HALO UNLIMITED, INC.,

Plaintiff and Appellant,

v.

COUNTY OF RIVERSIDE et al.,

Defendants and Respondents.

E069612

(Super.Ct.No. RIC1712062)

OPINION

APPEAL from the Superior Court of Riverside County. Daniel A. Ottolia, Judge. Reversed.

Eric N. Kibel for Plaintiff and Appellant.

Hooper, Lundy & Bookman, Glenn E. Solomon, Jennifer A. Hansen, and Catherine S. Wicker; and Ronak N. Patel, Deputy County Counsel, for Defendants and Respondents.

According to the operative complaint, the County of Riverside (County) operates a health care service plan for its employees called Exclusive Care. Plaintiff Halo Unlimited, Inc. (Halo), doing business as Infant Hearing Screening Specialists, provides

newborn hearing screening services. On behalf of Exclusive Care, the County contracts with various hospitals; these hospitals, in turn, contract with Halo. Until April 2016, the County paid Halo for services rendered to members of its plan. Thereafter, however, it refused to do so, explaining that it did not have a contract with Halo.

Halo then filed this action. It alleged that, based on the provisions of the Knox-Keene Act (Health & Saf. Code, § 1340 et seq.) (Act), it must be deemed to have an implied contract with the County. It amended its complaint to allege, additionally, that the County is operating its plan unlawfully, because its plan is neither licensed under the Act nor exempt from the Act's licensing requirement.

The County filed a demurrer. With respect to the first claim, it argued that a private party cannot state an implied contract cause of action against a public entity. With respect to the second claim, it argued that under the doctrine of judicial abstention, the determination of whether it was exempt presented complex economic and policy questions better left to the state Department of Managed Health Care (Department). The trial court sustained the demurrer and dismissed the action.

We will reverse. We will hold, based on controlling authority from the California Supreme Court as well as from this court, that a private party *can* sue a public entity on an implied contract theory. We will further hold that, even assuming a court is not well-suited to decide who should be granted a license under the Act, it *is* well-suited to decide who is *exempt* under the Act.

I

FACTUAL BACKGROUND

In accordance with the applicable standard of review (see part III, *post*), the following facts are taken from the operative complaint. To the extent that they are genuinely factual, we accept them as true. To the extent, however, that they are more properly conclusions of law, we accept them solely as representing Halo's contentions and not necessarily as true.

A. *Facts Supporting the First (Illegal Expenditure) Cause of Action*.

The County operates Exclusive Care. Exclusive Care is a "health care service plan" within the meaning of the Act.

The Act requires a health care service plan to be licensed, unless it is statutorily exempt. Exclusive Care is not exempt. Nevertheless, it is not licensed. Hence, the County is illegally expending public funds to operate Exclusive Care without the necessary license.

B. *Facts Supporting the Second* (*Implied Contract*) *and Third* (*Declaratory Relief*) *Causes of Action*.

Halo contracts with hospitals to provide newborn hearing screening services. It charges $275 per screening. Its contracts with the hospitals provide that it will bill the patient's insurance company or health plan.

Newborn hearing screening services are "essential health benefits" within the meaning of the Act. Under the Act, a health care service plan is obligated to pay for

essential health benefits provided to its members, even if the plan and the provider have no express contract with each other. This obligation constitutes an implied contract.

For several years, whenever Halo provided newborn hearing screening services to members of Exclusive Care, the County paid Halo for these services. In April 2016, however, the County stopped paying Halo. It took the position that: (1) Exclusive Care was not subject to the Act; (2) the County was obligated to pay hospitals, with which it had contracts, but not Halo, with which it did not have a contract; and (3) under its contracts with the hospitals, the County was only obligated to pay "case rates." For a newborn hearing screening, the case rate was $6.

II

PROCEDURAL BACKGROUND

Halo's operative (first amended) complaint asserted three causes of action: (1) to enjoin an illegal expenditure of public funds (Code Civ. Proc., § 526a); (2) for breach of implied contract; and (3) for declaratory relief.

The County filed a demurrer to the operative complaint. It argued, among other things:

1. Regarding the first (illegal expenditure) cause of action: The trial court should apply the judicial abstention doctrine.

2. Regarding the second (implied contract) cause of action: A private party cannot sue a public entity on an implied contract theory.

3. Regarding the third (declaratory relief) cause of action: This cause of action was entirely dependent on — and thus failed along with — the implied contract cause of action.

In its opposition, Halo argued:

1. The illegal expenditure cause of action did not fall within the scope of the judicial abstention doctrine.

2. A county can be sued on an implied contract theory.

After hearing argument, the trial court sustained the demurrer, without leave to amend.

It sustained the demurrer to the first cause of action based on judicial abstention: "[A]djudication of this claim would necessarily require the Court to determine whether . . . Exclusive Care is exempt from the licensing requirements of the Knox-Keene Act, [a] regulatory decision that would need to be made by the Department of Managed Health Care. Judicial abstention is therefore appropriate."

It sustained the demurrer to the second and third causes of action because: "Legislation may only create contractual rights when the statutory language or circumstances accompanying . . . the legislation's passage clearly show legislative intent to create private rights of a contractual nature enforceable against a government body. In the absence of such legislative intent, [Halo] may not maintain an action against the County on an implied-in-law or quasi-contract theory . . . ."

Counsel for Halo argued that *Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171 (*Retired Employees*) had held that "an implied contract cause of action will lie against the County." The trial court responded: "[I]n your complaint, you allege no statutory basis for the alleged contractual rights that you're seeking to enforce against the County. . . . [Y]ou're implying a contract based on . . . payments for services . . . prior to April 2016."

It added, however, "[T]his is obviously a good case to take up to the Court of Appeal[]." It then entered a judgment of dismissal.

III

GENERAL DEMURRER PRINCIPLES

The trial court should sustain a demurrer when "[t]he pleading does not state facts sufficient to constitute a cause of action." (Code Civ. Proc., § 430.10, subd. (e).)

"'Our standard of review of an order sustaining a demurrer is well settled. We independently review the ruling on demurrer and determine de novo whether the complaint alleges facts sufficient to state a cause of action. [Citation.] In doing so, we "give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law. [Citations.]" [Citation.]' [Citation.]" (*Bocanegra v. Jakubowski* (2015) 241 Cal.App.4th 848, 853.)

"'" . . . [I]t ordinarily constitutes an abuse of discretion to sustain a demurrer without leave to amend if there is a reasonable possibility that the defect can be cured by amendment. [Citations.]"' [Citations.] This abuse of discretion is reviewable on appeal 'even in the absence of a request for leave to amend' [citation], and even if the plaintiff does not claim on appeal that the trial court abused its discretion in sustaining a demurrer without leave to amend. [Citation.]" (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 970-971.)

IV

JUDICIAL ABSTENTION

A. *The Licensing and Exemption Provisions of the Act.*

The Act regulates health care service plans — i.e., health maintenance organizations (HMOs) and similar plans.

Its definition of a "health care service plan" includes "[a]ny person who undertakes to arrange for the provision of health care services to subscribers or enrollees, or to pay for or to reimburse any part of the cost for those services, in return for a prepaid or periodic charge paid by or on behalf of the subscribers or enrollees." (§ 1345, subd. (f)(1).)[1]

[1] This and all further statutory citations are to the Health and Safety Code, unless otherwise specified.

The Act creates the Department and puts it in "charge of the execution of the laws of this state relating to health care service plans and the health care service plan business." (§ 1341, subd. (a).)

The Act also requires a health care service plan to be licensed by the Department. (§ 1349; see also *id.*, § 1341.) This licensing requirement, however, is subject to a number of exemptions. (§§ 1343, 1349.1, 1349.2.) The particular exemption relevant here (public entity exemption) provides:

"(a) A health care service plan . . . operated by any . . . public entity . . . that satisfies all of the following criteria is exempt from this chapter:

"(1) Provides services or reimbursement only to employees, retirees, and the dependents of those employees and retirees, of any participating . . . public entity, . . . but not to the general public.

"(2) Provides funding for the program.

"(3) Provides that providers are reimbursed solely on a fee-for-service basis, so that providers are not at risk in contracting arrangements.

"(4) Complies with Section 1378[2] and . . . Section 1379.[3]

"(5) Does not reduce or change current benefits except in accordance with collective bargaining agreements, or as otherwise authorized by the governing body in

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2 This section prohibits excessive administrative costs.

3 This section states that a contract between a plan and a provider must be in writing and must provide that the plan's subscribers are not liable to the provider; if it does not, the provider cannot collect from the subscribers.

the case of unrepresented employees, and provides, pays for, or reimburses at least part of the cost of all basic health care services . . . .

"(6) Refrains from any conduct that constitutes fraud or dishonest dealing or unfair competition . . . and notifies enrollees of their right to file complaints with the director regarding any violation of this exemption.

"(7) Maintains a fiscally sound operation and makes adequate provision against the risk of insolvency so that enrollees are not at risk, individually or collectively, as evidenced by audited financial statements . . . .

"(8) Submits . . . a declaration . . . that the plan complies with this subdivision." (§ 1349.2, subd. (a).)

B. *Judicial Abstention*.

"As a general matter, a trial court may abstain from adjudicating a suit that seeks equitable remedies if 'granting the requested relief would require a trial court to assume the functions of an administrative agency, or to interfere with the functions of an administrative agency.' [Citation.] A court also may abstain when 'the lawsuit involves determining complex economic policy, which is best handled by the Legislature or an administrative agency.' [Citation.] In addition, judicial abstention may be appropriate in cases where 'granting injunctive relief would be unnecessarily burdensome for the trial court to monitor and enforce given the availability of more effective means of redress.' [Citation.]" (*Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 496.)

"'In cases where the trial court dismisses a cause of action based on the doctrine of judicial abstention, the standard of review is abuse of discretion. [Citations.]' [Citation.]" (*Klein v. Chevron U.S.A., Inc.* (2012) 202 Cal.App.4th 1342, 1361.)

The County relies on *Hambrick v. Healthcare Partners Medical Group, Inc.* (2015) 238 Cal.App.4th 124. There, the defendants (collectively HCP) were a "risk-bearing organization" as defined in Health and Safety Code section 1375.4, subdivision (g) — basically, a group of providers paid on a capitation basis. (*Hambrick* at pp. 133, 140-141.) The plaintiff alleged that HCP was nevertheless a health care service plan, and therefore it was required to be licensed, because it took on the "global risk" of patients' physician and hospital care. (*Id*. at p. 133; see also *id*. at pp. 132, 134.) The trial court sustained HCP's demurrer, based on judicial abstention, and dismissed the action. (*Id*. at p. 133; see also *id*. at p. 138.)

The appellate court noted: "We are not aware of any current provision of the Knox-Keene Act or the [Department] regulations that defines 'global risk' or states that a risk-bearing organization taking on global risk thereby is transformed into a health care service plan." (*Hambrick v. Healthcare Partners Medical Group, Inc., supra,* 238 Cal.App.4th at p. 143.) Rather, the plaintiff was relying on a 2002 internal memo of the Department. (*Ibid*.) That memo opined that a capitation plan that shifted all of the risk of both hospital ("institutional") care and physician ("professional") care to a single provider organization would require that the provider organization be licensed. (*Id*. at pp. 144-146.) However, the memo also stated that "'[c]onsideration of risk sharing

arrangements is a complex topic' that 'is complicated further by a statutory/regulatory structure that provides limited guidance.'" (*Id*. at p. 145.) Moreover, it stated that "'additional guidance as to the meaning of "institutional[,"] "non-institutional" and "forms of global risk" is still needed'", and that there were "'gray area[s]'" as to "'what constitutes institutional services'" and "'as to whether or not the financial risk associated with providing those services has been contractually assumed by a provider organization.'" (*Id*. at p. 146.)

In light of the memo, the appellate court concluded that "the determination of the level of financial risk under a capitation agreement that causes a 'risk-bearing organization' . . . to become a 'health care service plan' . . . is precisely the type of regulatory determination involving complex economic policy that should be made by the [Department] in the first instance." (*Hambrick v. Healthcare Partners Medical Group, Inc., supra,* 238 Cal.App.4th at p. 149.) "[T]he determination of whether HCP was required to be licensed would, as the trial court aptly noted, 'require[] a detailed analysis of complex corporate structures, of risk allocation via service provider "cap[it]ation" contracts of the cost of providing medical care, and many related factual and legal issues.' The court therefore would be required to determine complex economic policy within the context of the managed health care system. This is a task properly left to the Director of the [Department]. Any contrary conclusion would require the trial court to assume the functions of the Director of the [Department] and effectively usurp the director's powers." (*Id*. at p. 152; see also *Desert Healthcare Dist. v. PacifiCare FHP,*

Inc. (2001) 94 Cal.App.4th 781, 794-796 [abstention was proper in case alleging that capitation agreements violated Unfair Competition Law (UCL), because court would have to determine whether defendant "transferr[ed] too much risk . . . without adequate oversight"], disapproved on other grounds by *Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1014, fn. 10.)

Halo, on the other hand, relies on *Arce v. Kaiser Foundation Health Plan, Inc.*, *supra*, 181 Cal.App.4th 471. *Arce* was a putative class action under the UCL. The plaintiff alleged that the defendants (collectively Kaiser) had breached their contract and violated the Mental Health Parity Act (§ 1374) "by categorically denying coverage for behavioral therapy and speech therapy to plan members with autism spectrum disorders." (*Arce* at p. 478; see also *id*. at p. 480.) The trial court sustained Kaiser's demurrer, reasoning that the Mental Health Parity Act required "medically necessary" mental health treatment, and it was not well-suited to determine what services were medically necessary. (*Id*. at p. 481.)

The appellate court held that this was an abuse of discretion. (*Arce v. Kaiser Foundation Health Plan, Inc.*, *supra*, 181 Cal.App.4th at pp. 496-502.) Based on a thorough review of the case law (*id*. at pp. 497-499), it observed that "trial courts can properly exercise jurisdiction over UCL claims that seek equitable relief for violations of the Knox-Keene Act . . . ." (*Id*. at p. 498.)

Earlier in its opinion, it had held that the trial court was not "require[d] . . . to make individualized determinations of medical necessity for class members" (*Arce v.*

Kaiser Foundation Health Plan, Inc., supra, 181 Cal.App.4th at p. 488), because Kaiser had denied any coverage whatsoever. (*Id*. at p. 489.) It therefore concluded that "resolution of the UCL claim would not call upon the court to engage in individualized determinations of medical necessity for each putative class member, but rather to perform the basic judicial functions of contractual and statutory interpretation." (*Id*. at p. 499.)

Specifically, to determine whether there was a breach of contract, "the trial court would need to interpret the relevant terms of the contract, and decide whether the therapies are or are not covered services." (*Arce v. Kaiser Foundation Health Plan, Inc., supra,* 181 Cal.App.4th at p. 499.) To determine whether there was a violation of the Mental Health Parity Act, "the trial court would need to interpret the relevant provisions of the Mental Health Parity Act and the Knox-Keene Act, and decide whether the therapies are health care services under the statute and whether the statutes requires that the services only be provided by state licensed or certified professionals. Issues of statutory interpretation clearly are questions of law for the courts. [Citation.]" (*Arce* at p. 500.)

It added: "Adjudication of Arce's UCL claim . . . would not call upon the court to determine complex issues of economic or health policy. . . . The legal question before the trial court is whether the therapies at issue are 'health care services' within the meaning of the Mental Health Parity Act and the Knox-Keene Act, and if so, whether the statute requires that the services only be provided by persons licensed or certified by the state. These are issues of statutory interpretation that are well-suited for adjudication by the

courts." (*Arce v. Kaiser Foundation Health Plan, Inc.*, *supra*, 181 Cal.App.4th at pp. 500-501.) "Arce's request for injunctive relief also would not require the trial court to assume or interfere with the functions of an administrative agency. . . . [A]lthough the Knox-Keene Act expressly authorizes the [Department] to enforce the statute, its jurisdiction is not exclusive. [Citations.]" (*Id*. at p. 501; see also *Blue Cross of California, Inc. v. Superior Court* (2009) 180 Cal.App.4th 1237, 1257-1259 [city attorney's action to enjoin postclaims underwriting, prohibited by the Act, does not "ask[] the court to assume or interfere with the functions of an administrative agency" and "does not call upon the court to determine complex economic policy."].)

This case is closer to *Arce* than to *Hambrick*. The trial court could determine whether the County's plan is exempt without having to trespass into the Department's bailiwick.

The criteria for the public entity exemption do not require any complex economic policy determinations. Rather, they present straightforward factual questions — such as whether providers are reimbursed on a fee-for-service basis, and whether the plan has engaged in fraud or dishonest dealing or unfair competition — that a court is equipped to decide. The only criteria that even arguably resemble policy determinations are the ones that require "fiscally sound operation" (§ 1349.2, subd. (a)(7)) and that prohibit "excessive" administrative costs (§ 1349.2, subd. (a)(4), incorporating § 1378). However, it would seem that a court could apply these easily enough based on testimony from expert witnesses who are familiar with the standards in the industry. To modify the

words of *Blue Cross* only slightly, "The Legislature has already made the relevant policy determinations by defining [the public entity exemption]. The court is, in the main, merely being called upon to enforce those statutory [criteria]." (*Blue Cross of California, Inc. v. Superior Court*, *supra*, 180 Cal.App.4th at p. 1259.)

In *Hambrick*, the issue was not whether the defendants were exempt; it was whether they were a health care services plan at all. The plaintiff claimed that they were because they took on "global risk." The appellate court expressed skepticism about this theory; however, it concluded that, even if it was valid, a court was not well-suited to assess the appropriate level of risk. Here, the public entity exemption does not involve "global risk" or any similarly vague and policy-laden criterion.

Understandably, the County points to statutes giving the Department the sole authority to grant a license. (§§ 1349, 1353.) Again, however, the issue is whether the County's plan is *exempt*, not whether it should be given a license.[4] Pursuant to its statutory authority (§ 1343, subd. (b)), the Department has established a number of categorical exemptions. (28 Cal. Code Regs. §§ 1300.43-1300.43.15.) However, it does not appear that it approves individual exemptions in advance.[5] There is a provision

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[4] This argument seems to have misled the trial court. It stated, "[T]his Court can't . . . decide who should be licensed and who shouldn't be. That seems to be purely a regulatory function . . . ."

[5] The County states, "Under Health & Safety Code section 1349, it is unlawful for any person to engage in business as a health care service plan unless he or she has first secured a license from the director or is found by [the Department] to qualify for an exemption." But that is false. What section 1349 actually says is: "It is unlawful for any person to engage in business as a plan in this state . . . unless such person has first

allowing it to terminate a public entity exemption (§ 1349.2, subd. (b)) but no provision for it to grant one.

The County nevertheless asserts that the Department "granted the County an exemption." This is misleading, in two respects. First, the County cites a letter that is in the appellate record only because the County asked the trial court to take judicial notice of it; the trial court, however, denied that request. The County does not claim this was error. Thus, this letter was never properly before the trial court.

Second, the letter is not the "grant" of an exemption. Rather, it is a response to the County's "[r]equest for [o]pinion." The Act authorizes the Department to "honor requests from interested parties for interpretive opinions." (§ 1344, subd. (c).) The letter states that, based on the information provided by the County — specifically, financial statements plus a County attorney's "represent[ation] that the County is in compliance with all other requirements of section 1349.2" — the County's plan is exempt. Plainly the Department did no independent investigation.[6]

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secured from the director a license . . . or unless such person *is exempted* . . . ." (Italics added.)

[6] We also note that the Department did not make any complex economic policy determinations in the letter. Indeed, it would seem that the County's attorney at the time felt competent, on his own, to determine and to represent that the bulk of the exemption criteria applied.

Finally, injunctive relief would not be unnecessarily burdensome. Should the trial court determine that the County's plan is not exempt, it would simply enjoin the County from funding the plan unless and until the plan is licensed.

We therefore conclude that the trial court had no discretion to abstain from deciding the first cause of action.[7]

V

A PUBLIC ENTITY'S LIABILITY ON AN IMPLIED CONTRACT THEORY

Halo contends that the trial court erred by sustaining the demurrer to its implied contract and declaratory relief causes of action on the ground that a public entity cannot be liable on an implied contract theory.

"A contract is either express or implied." (Civ. Code, § 1619.) "An express contract is one, the terms of which are stated in words." (Civ. Code, § 1620.) "An implied contract is one, the existence and terms of which are manifested by conduct." (Civ. Code, § 1621.) "Implied contracts, more accurately called contracts implied in fact, should be distinguished from contracts implied in law, or quasi-contracts. [Citations.] [¶] 'Quasi-contracts have often been called implied contracts or contracts implied in law; but, unlike true contracts, quasi-contracts are not based on the apparent intention of the

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[7] Halo seems to think the trial court applied judicial abstention to all three of its causes of action. Not so. The County raised judicial abstention solely with respect to the first cause of action, and thus, the trial court applied judicial abstention solely to the first cause of action. As Halo itself points out, judicial abstention cannot apply to a cause of action for damages. (*Shuts v. Covenant Holdco LLC* (2012) 208 Cal.App.4th 609, 625.)

parties to undertake the performances in question, nor are they promises. They are obligations created by law for reasons of justice.' [Citation.]" (1 Witkin, Summary of Cal. Law (11th ed. 2017) Contracts, § 103, p. 148.)

Halo's allegation that an implied contract existed is extremely conclusory. Nevertheless, we can tell that it is asserting two alternative bases for this conclusion.

First, Halo alleges that, until April 2016, the County routinely paid it for screenings, and that this gave rise to a "contract[] implied-in-fact and/or implied-at-law." Actually, this alleges an implied-in-fact contract; i.e., it arose from the County's apparent consent.

Second, Halo alleges that "the Knox-Keene Act establishes an implied-at-law and/or implied-in-fact contract between a medical provider and a member's or beneficiary's health plan." In support of this allegation, the complaint cites sections 1371.31, 1371.9, and 1379.[8] This actually alleges an implied-in-law contract; i.e., it is imposed on the County without regard to its consent.[9]

The County did not challenge Halo's claim that an implied contract existed; it accepted it, for purposes of the demurrer, but argued that it could not be held liable on an implied contract. Accordingly, we, too, accept, for purposes of this appeal, that but for

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[8] In its opening brief, Halo cites, as additional authority, section 1371 and 28 California Code of Regulations section 1300.71(a)(3).

[9] In fact, as we discuss further below, it is probably better viewed as a claim for a violation of the cited statutes.

the County's public entity status, Halo has adequately alleged the formation of an implied contract.

We begin with the proposition that "no contractual obligation may be enforced against a public agency unless it appears the agency was authorized by the Constitution or statute to incur the obligation; a contract entered into by a governmental entity without the requisite constitutional or statutory authority is void and unenforceable. [Citations.]" (*Air Quality Products, Inc. v. State of California* (1979) 96 Cal.App.3d 340, 349.)

"'"Persons dealing with a public agency are presumed to know the law with respect to any agency's authority to contract. [Citation.] '"One who deals with the public officer stands presumptively charged with a full knowledge of that officer's powers, and is bound at his . . . peril to ascertain the extent of his . . . powers to bind the government for which he . . . is an officer . . . ."' [Citation.]"' [Citation.]" (*Torres v. City of Montebello* (2015) 234 Cal.App.4th 382, 399.)

For example, where a city's charter requires its contracts to be in writing, an oral modification is unenforceable. (*Katsura v. City of San Buenaventura* (2007) 155 Cal.App.4th 104, 108-109.) "Pleading common counts . . . does not abrogate these restrictions. Common counts [are] an alternate theory of recovery based on a contract that is either 'implied in fact' or 'implied in law.' [Citations.] [¶] It is settled that 'a private party cannot sue a public entity on an implied-in-law or quasi-contract theory, because such a theory is based on quantum meruit or restitution considerations which are

outweighed by the need to protect and limit a public entity's contractual obligations.' [Citations.]" (*Id*. at pp. 109-110.)

By contrast, "[g]overnmental subdivisions may be bound by an implied contract if there is no statutory prohibition against such arrangements. [Citations.]" (*Youngman v. Nevada Irr. Dist.* (1969) 70 Cal.2d 240, 246; accord, *Buck v. City of Eureka* (1899) 124 Cal. 61, 66 ["[W]here, as here, the authority existed in the council to employ plaintiff after he ceased to be city attorney, he may recover upon an implied contract for the value of his services."].) In this court's own words, "we have no doubt that a public agency may be found liable in appropriate circumstances on the basis of . . . an implied-in-fact contract . . . [citations]" (*Air Quality Products, Inc. v. State of California, supra,* 96 Cal.App.3d at p. 349.)

Retired Employees, supra, 52 Cal.4th 1171 states the Supreme Court's recent holding to this effect. The County and, to some extent, the trial court, have relied on isolated portions of *Retired Employees* taken out of context. Accordingly, we must discuss the entire case in some detail.

There, the plaintiff — an organization of retired county employees — claimed that a county could not change its method of calculating their health care premiums. It argued that a contract to use its preferred method could be implied from a series of county board resolutions from 1985 through 2007, each approving a memorandum of understanding, which used that calculation method, albeit for one year only. (*Retired Employees, supra,* 52 Cal.4th at pp. 1177-1178.)

The Supreme Court defined the issue before it as "'[w]hether, as a matter of California law, a California county and its employees can form an implied contract that confers vested rights to health benefits on retired county employees.'" (*Retired Employees, supra,* 52 Cal.4th at p. 1176.) It then held "that a county may be bound by an implied contract under California law if there is no legislative prohibition against such arrangements, such as a statute or ordinance. [Citation.]" (*Ibid*.)

"All contracts, whether public or private, are to be interpreted by the same rules unless otherwise provided by the Civil Code. [Citations.] In the private sector, it is well understood that collective bargaining agreements are intended to govern '"a myriad of cases which the draftsmen cannot wholly anticipate"' [citation]; that resort may be had, in appropriate circumstances, to the parties' practice, usage, and custom in interpreting the agreement [citation]; and that such agreements 'often contain implied, as well as express, terms' [citation]. Our precedents similarly find, in the public employment context, that '[g]overnmental subdivisions may be bound by an implied contract if there is no statutory prohibition against such arrangements.' [Citation.]" (*Retired Employees, supra,* 52 Cal.4th at p. 1179.)

The county cited Government Code section 25300 (*Retired Employees, supra,* 52 Cal.4th at pp. 1183-1184), which provides a county may prescribe the compensation of its employees "by resolution . . . as well as by ordinance." The Supreme Court responded: "We need not decide whether County, in light of Government Code section 25300 . . . may form an implied contract with its employees on matters of compensation

though, as [the plaintiff] assured us at oral argument that it was seeking recognition only of an implied *term* of an existing contract (and not the recognition of an implied *contract*). That matters of compensation must be addressed by resolution does not necessarily bar recognition of implied terms concerning compensation. Under California law, contractual rights may be implied from legislative enactments under limited circumstances, as described further below." (*Retired Employees, supra,* 52 Cal.4th at p. 1185.)

It noted that there is a presumption against construing a statute as creating a contract, because statutes, "'unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body.' [Citations.]" (*Retired Employees, supra,* 52 Cal.4th at pp. 1185-1186.) Nevertheless, "legislation . . . may be said to create contractual rights when the statutory language or circumstances accompanying its passage 'clearly ". . . evince a legislative intent to create private rights of a contractual nature enforceable against the [governmental body].'" [Citation.]" (*Id*. at p. 1187.)

It summed up its discussion of Government Code section 25300 as follows: "Although Government Code section 25300 does require that compensation of county employees be addressed in an ordinance or resolution, the statute does not prohibit a county from forming a contract with implied terms, inasmuch as contractual rights may be implied from an ordinance or resolution when the language or circumstances

accompanying its passage clearly evince a legislative intent to create private rights of a contractual nature enforceable against the county." (*Retired Employees*, *supra*, 52 Cal.4th at pp. 1176-1177.)

The holding in *Retired Employees* — "that a county may be bound by an implied contract under California law if there is no legislative prohibition against such arrangements, such as a statute or ordinance" (*Retired Employees, supra*, 52 Cal.4th at p. 1176) — is controlling here.

Admittedly, *Katsura v. City of San Buenaventura*, *supra*, 155 Cal.App.4th 104, stated flatly that "'a private party cannot sue a public entity on an implied-in-law or quasi-contract theory . . . .' [Citations.]" (*Id*. at pp. 109-110.) Elsewhere in the opinion, however, the court noted that the alleged implied contract conflicted with the defendant city's charter (*id*., at pp. 108-109) and quoted multiple cases to the effect that a public entity cannot be bound by an implied contract that violates a statute, charter, or ordinance. (*Id*. at pp. 108-110.) Similarly, *Green Valley Landowners Assn. v. City of Vallejo* (2015) 241 Cal.App.4th 425 stated flatly that "*all* implied contracts against public entities are barred because, by definition, they have not formally been approved by the entity." (*Id*. at p. 438.) However, this was only an alternative holding (see *id*., at pp. 437-438); the court also held that the alleged implied contract violated Government Code section 40602, which required contracts with a city to be in writing and signed by its mayor. (*Green Valley*, *supra*, at pp. 434-437.) To the extent that *Katsura* and *Green Valley* are contrary to *Retired Employees* and *Younger*, we must decline to follow them.

The County argues, however, that *Retired Employees* applies only to an implied *term* in an existing *written* contract and does not extend to an implied *contract*. Given the breadth of the court's stated holding, we cannot agree. Moreover, *Younger* and *Buck*, which we cited above, are not so limited.

The County bases this argument on the Supreme Court's statement that "[the plaintiff] assured us at oral argument that it was seeking recognition only of an implied *term* of an existing contract (and not the recognition of an implied *contract*)." (*Retired Employees*, *supra*, 52 Cal.4th at p. 1185.) It said this, however, only as one reason why it did not have to decide whether Government Code section 25300 applied. (*Ibid*.) This statement in no way limited its holding that *when* an implied contract is not statutorily prohibited, it *can* bind a county. Government Code section 25300 clearly does not apply here.

Indeed, the County has not pointed to *any* statutory limitation or restriction on its power to enter into an implied contract. It has no charter; it is a general law County. We have skimmed the provisions of the Constitution (Cal. Const., art. XI) as well as of the Government Code (Gov. Code, § 23000 et seq.) pertaining to counties, but nothing has jumped out at us as constituting such a limitation or restriction.[10] At oral argument, the

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[10] As mentioned in footnote 3, *ante*, section 1379, subdivision (a) provides that a contract between a plan and a provider "shall be in writing . . . ." However, section 1379, subdivision (b) further provides, "In the event that the contract has not been reduced to writing . . . , the contracting provider shall not collect or attempt to collect from the subscriber or enrollee sums owed by the plan." Arguably, the latter subdivision

County asserted for the first time that it had an ordinance limiting its power to enter into an implied contract; however, it did not cite the ordinance, nor did it specify what the ordinance supposedly says. We deem it to have forfeited any reliance on any such ordinance for purposes of this appeal. (Cal. Rules of Court, rule 8.204(a)(1)(B).)

To its credit, it appears that the trial court correctly understood *Retired Employees* as holding that a county *can* be sued on an implied contract theory, at least under some circumstances. However, it also appears to have understood *Retired Employees* as holding that a plaintiff can state an implied contract cause of action against a public entity *only* when the contract is implied from legislation; and, in that event, the legislation must show a clear intent to create a private right of action. Thus, it stated: "[I]n your complaint, you allege no statutory basis for the alleged contractual rights that you're seeking to enforce against the County. . . . [Y]ou're implying a contract based on . . . payments for services . . . prior to April 2016."

This was a misreading of *Retired Employees*. The Supreme Court did discuss whether a statute can create contractual rights, but only because there, the county was arguing that Government Code section 25300 required the compensation of county employees to be prescribed by statute or resolution. The Supreme Court concluded that

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suggests that an implied contract between a plan and a provider can nevertheless be effective.

In any event, the County has not argued that the implied contract that Halo alleges in this action is barred by section 1379. Hence, we need not and we do not decide this issue.

Government Code section 25300 was not violated, as long as the asserted contract could be implied from county resolutions. We repeat that neither Government Code section 25300 nor any similar restriction applies here.

Moreover, the rule on which the trial court relied — that "legislation . . . may be said to create contractual rights when the statutory language or circumstances accompanying its passage 'clearly ". . . evince a legislative intent to create private rights of a contractual nature enforceable against the [governmental body]"'" (*Retired Employees, supra,* 52 Cal.4th at p. 1187) — is relevant only when the question is whether a governmental body's *own* legislation creates contractual rights that are binding on *it*. The Supreme Court urged courts to tread cautiously in this area, because otherwise, a governmental body could not amend or repeal its own statutes. Here, however, Halo contends that *state* legislation — i.e., the Act — creates contractual rights that are binding on the *County*. Given state legislative supremacy, we have no doubt that the state can do so. "[T]he Legislature may regulate as to matters of statewide concern even if the regulation impinges 'to a limited extent' [citation] on powers the Constitution specifically reserves to counties [citation] . . . ." (*County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 287.)

The trial court also misread Halo's complaint; it did allege a statutory basis for the alleged implied contract. As already discussed, it alleged an implied-in-fact contract based on the fact that the County had paid it for newborn hearing screening services until April 2016. Alternatively, however, it also alleged an implied-in-law contract based on

the provisions of the Act. Even under the trial court's mistaken understanding of *Retired Employees*, this was sufficient to state a cause of action.[11]

Finally, we also note that, to the extent that Halo's implied contract cause of action was based on the Act (and related statutes and regulations), it did not really involve an implied contract at all. Rather, it was, in effect, a claim that the applicable statutes, taken together, *required* the County to pay Halo, without regard to the County's consent. (Cf. *Prospect Medical Group, Inc. v. Northridge Emergency Medical Group* (2009) 45 Cal.4th 497, 506-507 [only reasonable interpretation of the Act, taken as a whole, is that it prohibits emergency room doctors from billing patients directly].) Even assuming the cause of action was defective, because it was labeled as an implied contract cause of action, there is at least a reasonable possibility that it could be amended to state a cause of action for a statutory violation.

We therefore conclude that the trial court erred by sustaining the demurrer to the second and third causes of action.

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11 If only out of an excess of caution, Halo attempts to explain the statutory basis for its implied contract claim. We cannot claim to follow every step of its explanation. The County, however, did not demur on the ground that the Act cannot be construed as creating the alleged implied contract, and it raises no such argument in this appeal. As already mentioned, the County accepts, if only for the sake of argument, that an implied contract does exist.

Accordingly, we leave the question of whether the Act *actually* gives rise to an implied contract between the parties to be adjudicated in further proceedings below.

VI

RELIEF FROM THE COUNTY'S WAIVER OF OBJECTIONS TO HALO'S REQUEST FOR PRODUCTION OF DOCUMENTS

Halo also contends that the trial court erred by granting the County relief from its waiver of objections to Halo's request for production of documents.

A. *Additional Factual and Procedural Background*.

According to counsel for Halo, on August 18, 2017, he served the County, by mail, with a request for production of documents. He also emailed a courtesy copy.

The request stated that production of documents was due on October 2, 2017. Although the request did not so state, a written response was due, as a matter of law, on September 22, 2017. (Code Civ. Proc., § 2031.260, subd. (a).)

According to the County, it never received the mailed copy of the request. However, it admitted that it did receive the emailed copy. Based on that, a County legal assistant calendared September 18, 2017 as the date to respond and to produce documents. The County's attorney, however, mistakenly calendared both the response and the production for October 2, 2017.

On September 7, 2017, the County's attorney gave the legal assistant a draft response; he told her to finalize it but not to serve it yet. She complied. As a result of its attorney's "mistake, inadvertence or excusable neglect," the County failed to serve a timely written response.

On September 28, 2017, Halo's attorney called the failure to the attention of the County's attorney. Later that day, the County belatedly served a written response. In it, the County objected to each and every request as vague and ambiguous, irrelevant, overbroad, unduly burdensome, and violating the privacy of third parties. Accordingly, the County did not produce any documents.

The trial court granted the County's motion for relief from its waiver of objections.

B. *Discussion.*

The failure to serve a timely response to a request for production of documents results in a waiver of any objection to the request. (Code Civ. Proc., § 2031.300, subd. (a).) However, the trial court can relieve a party from such a waiver if "both of the following conditions are satisfied:

"(1) The party has subsequently served a response that is in substantial compliance with Sections 2031.210, 2031.220, 2031.230, 2031.240, and 2031.280.

"(2) The party's failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect." (Code Civ. Proc., § 2031.300, subd. (a).)

We review an order granting or denying relief from waiver under the abuse of discretion standard. (*City of Fresno v. Superior Court* (1988) 205 Cal.App.3d 1459, 1467; see generally *Haniff v. Superior Court* (2017) 9 Cal.App.5th 191, 198 ["'The standard of review generally applicable to review of discovery orders is abuse of

discretion, as management of discovery lies within the sound discretion of the trial court.'"].)

Halo does not challenge the trial court's implied finding of mistake, inadvertence, or excusable neglect. It argues only that the County's response "fail[ed] to substantially comply with C.C.P. §203[1].240(b) and (c) with regard to claims of privilege."

The subdivisions that Halo cites, as relevant here, state:

"(b) If the responding party objects to the demand for inspection, copying, testing, or sampling of an item or category of item, the response shall do both of the following:

"(1) Identify with particularity any document, tangible thing, land, or electronically stored information falling within any category of item in the demand to which an objection is being made.

"(2) Set forth clearly the extent of, and the specific ground for, the objection. If an objection is based on a claim of privilege, the particular privilege invoked shall be stated. . . .

"(c)(1) If an objection is based on a claim of privilege . . . , the response shall provide sufficient factual information for other parties to evaluate the merits of that claim, including, if necessary, a privilege log." (Code Civ. Proc., § 2031.240, subds. (b), (c).)

The County, however, did not object based on any privilege. The response itself is not in the record. Halo, however, claimed that the County gave the same response to each request; Halo quoted it verbatim. The response did not refer to privilege or work

product. Admittedly, counsel for Halo stated in his declaration that "the County . . . objected on the basis of various privileges . . . ." However, because this was a legal conclusion, and because it was contradicted by the very response that Halo itself quoted, the trial court could reasonably disregard it. (*United Parcel Service Wage & Hour Cases* (2010) 190 Cal.App.4th 1001, 1018.)

Halo complains that "the County's boilerplate objections [were not] germane . . . to the requests for production served [and] were served in bad faith . . . ." Even if so, Halo has not shown that the response violated Code of Civil Procedure section 2031.240, subdivisions (b) and (c). As the trial court advised Halo, "It seems like your arguments would be best taken up on a motion for further responses."

VII

ATTORNEY FEES ON APPEAL

Halo argues that we should award it attorney fees on appeal on a "private attorney general" theory. (Code Civ. Proc., § 1021.5.) The County, somewhat unhelpfully, does not respond to this argument. However, we do not regard this as a concession. (See *Petrosyan v. Prince Corp.* (2013) 223 Cal.App.4th 587, 593, fn. 2 ["failure to file a respondent's brief does not mandate automatic reversal . . . ."].)

Halo's request jumps the gun. Code of Civil Procedure section 1021.5 allows a court to award attorney fees, under certain circumstances, to "a successful party" in an "action which has resulted in the enforcement of an important right affecting the public interest . . . ." Here, Halo has been "successful" in this appeal, but it may or may not be

"successful" in the "action." Moreover, the mere fact that the County's demurrer must be overruled does not mean an "important right affecting the public interest" has been enforced. It is possible that Halo has won this battle but will yet lose the war.

For the sake of completeness, we acknowledge that some cases have authorized an award of attorney fees under Code of Civil Procedure section 1021.5 before the entry of a final judgment; in each of these cases, however, it was clear that one party was "the successful party" and that the action had "resulted in the enforcement of an important right affecting the public interest," even though other issues (such as damages) remained to be litigated. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 427-428; *California Trout, Inc. v. Superior Court* (1990) 218 Cal.App.3d 187, 212; *Bouvia v. County of Los Angeles* (1987) 195 Cal.App.3d 1075, 1080, 1084-1086; *Sundance v. Municipal Court* (1987) 192 Cal.App.3d 268, 271; *Bartling v. Glendale Adventist Medical Center* (1986) 184 Cal.App.3d 97, 102.) That is not the situation here. "[W]hile [Halo] may ultimately be entitled to an award of attorney's fees, an award for this *interim* appellate success would be premature." (*Liu v. Moore* (1999) 69 Cal.App.4th 745, 755; see also *Urbaniak v. Newton* (1993) 19 Cal.App.4th 1837, 1844 ["Although a case need not be completely final prior to an award of section 1021.5 fees, the benefit obtained must be 'secure' before the fees may be awarded."].)

Finally, even if the request were not premature, we would deny it. "[I]n many, perhaps most, cases, . . . the trial court will be better equipped to decide whether fees

should be awarded under section 1021.5. It is therefore proper for a reviewing court to defer to the trial court in making that determination. [Citations.]" (*Laurel Heights Improvement Assn. v. Regents of University of California, supra,* 47 Cal.3d at p. 426.)

VIII

DISPOSITION

The order granting the County relief from its waiver of objections to Halo's request for production of documents is affirmed. The judgment is reversed. Halo is awarded costs on appeal against the County.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

MILLER
J.

RAPHAEL
J.